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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA - SANTA ROSA DIVISION

In re

BRIAN EUGENE BAKER,  
Debtor(s).

Case No.10-10091-AJ

Chapter 7

R.S. No. MAW-1887

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DATE: May 13, 2010  
TIME: 9:00 am

99 South "E" Street  
Santa Rosa, CA 95404-6524

Wells Fargo Bank, NA<sup>1</sup> ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary to enforce its security interest in real property generally described as 1243 Maple Pines Avenue, North Las Vegas, Nevada 89081.

On or about January 14, 2010, Brian Eugene Baker ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and Timothy W. Hoffman was appointed as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtor and the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

<sup>1</sup> This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **MOVANT IS ENTITLED TO RELIEF FROM THE**  
4 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

5 **NO EQUITY**

6 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the  
7 debtor does not have any equity in the property and the property is not necessary to the debtor's  
8 effective reorganization.

9 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:  
10 § 362(d)(2) reflects congressional intent to allow creditors to  
11 immediately proceed against the property where the debtor has no  
12 equity and it is unnecessary to the reorganization, even where the  
13 debtor can provide adequate protection under § 362(d)(1).  
14 (Emphasis added).  
15 Id. at 610 (emphasis added).

16 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court  
17 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all  
18 encumbrances are totalled, whether or not all the lienholders have joined in the request  
19 for relief from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745  
20 F.2d 1194 (9th Cir. 1984).

21 An appropriate cost of sale factor should also be added to determine if the debtor has any  
22 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289  
23 (Bankr. S.D. Cal. 1982).

24 On or about June 16, 2006, Debtor, for valuable consideration, made, executed and  
25 delivered to ERNST, Inc ("Lender") a Note in the principal sum of \$212,800.00 (the "Note").  
26 Pursuant to the Note, Debtor is obligated to make monthly principal and interest payments  
27 commencing August 1, 2006, and continuing until July 1, 2036, when all outstanding amounts  
28 are due and payable. The Note provides that, in the event of default, the holder of the Note has  
the option of declaring all unpaid sums immediately due and payable. A true and correct copy of  
the Note is attached to the Declaration in Support of Motion for Relief From Automatic Stay as  
exhibit A and incorporated herein by reference.

1 On or about June 16, 2006, the Debtor made, executed and delivered to Lender a Deed of  
2 Trust (the "Deed of Trust") granting Lender a security interest in real property commonly  
3 described as 1243 Maple Pines Avenue, North Las Vegas, Nevada 89081 (the "Real Property"),  
4 which is more fully described in the Deed of Trust. The Deed of Trust provides that attorneys'  
5 fees and costs incurred as a result of the Debtor's bankruptcy case may be included in the  
6 outstanding balance under the Note. The Deed of Trust was recorded on June 29, 2006, in the  
7 Official Records of Clark County, State of Nevada. A true and correct copy of the Deed of Trust  
8 is attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit B  
9 and incorporated herein by reference.

10 Subsequently, all beneficial interest in the Deed of Trust was sold, assigned and  
11 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust  
12 evidencing the Assignment of the Deed of Trust to Movant is attached to the Declaration in  
13 Support of Motion for Relief From Automatic Stay as exhibit C and incorporated herein by  
14 reference.

15 The obligation under the Note is in default as of April 1, 2009, for failure to make  
16 payments to Movant. As of April 6, 2010, the total obligation due and owing under the Note is in  
17 the approximate amount of \$224,839.98, representing the principal balance of \$204,586.53,  
18 interest in the sum of \$15,430.11, late charges in the amount of \$489.30, escrow advances in the  
19 amount of \$2,803.76, and a recoverable balance in the amount of \$1,530.28. This is an  
20 approximate amount for purposes of this Motion only, and should not be relied upon as such to  
21 pay off the subject loan as interest and additional advances may come due subsequent to the  
22 filing of the Motion. An exact payoff amount can be obtained by contacting Movant's counsel.  
23 Further, Movant has incurred additional post-petition attorneys' fees and costs in bringing the  
24 instant Motion. Moreover, the total arrears under the Note are in the approximate sum of  
25 \$24,594.62, excluding the post-petition attorneys' fees and costs incurred in filing the instant  
26 Motion. A true and correct copy of the contractual payment accounting pursuant to Local Rule  
27 4001-1(g)(1) is attached to the Declaration in Support of Motion for Relief From Automatic Stay  
28 as exhibit D and incorporated herein by reference.

1 II.

2 **RELIEF FROM STAY**

3 **LACK OF EQUITY**

4 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and  
5 Statements, the fair market value of the Property is approximately \$140,000.00. True and  
6 correct copies of the Debtor's bankruptcy Schedules "A" and "D" are collectively attached to  
7 the Declaration in Support of Motion for Relief From Automatic Stay as exhibit E and  
8 incorporated herein by reference.

9 Based on the above, Movant maintains that the equity in the Property is as follows:

|  |                    |
|--|--------------------|
| 10 Fair Market Value:                              | \$140,000.00       |
| 11 Less:   |                    |
| 12 Movant's Trust Deed                             | \$224,839.98       |
| 13 Beth M. & Beavdry T. Parker's 2nd Deed of Trust | \$20,000.00        |
| 14 Bank of America's 3rd Deed of Trust             | \$25,734.00        |
| 15 Costs of Sale (8%)                              | <u>\$11,200.00</u> |
| 16 Equity in the Property:                         | \$<141,773.98>     |

17 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since  
18 this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is  
19 entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

20 Debtor's Statement of Intent indicates it is the intent of the Debtor to surrender the Real  
21 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtor's  
22 Statement of Intent is attached to the Declaration in Support of Motion for Relief From  
23 Automatic Stay as exhibit F and incorporated herein by reference.

24 **III.**

25 **MOVANT IS ENTITLED TO RELIEF FROM THE**

26 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

27 **CAUSE - LACK OF ADEQUATE PROTECTION**

28 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to  
adequate protection of its interest in the Property.

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1 Movant submits that adequate protection in this case requires normal and periodic cash  
2 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed  
3 to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

4 Movant is informed and believes that Debtor is presently unwilling or unable to provide  
5 adequate protection to the Movant and there is no probability that adequate protection can be  
6 afforded to Movant within a reasonable time.

7 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.  
8 § 362(d)(1), based upon the failure of ("Debtor to provide adequate protection to Movant.

9 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

10 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the  
11 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of  
12 Trust;

13 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

14 3. Granting Movant leave to foreclose on the Real Property and to enforce the  
15 security interest under the Note and the Deed of Trust, including any action necessary to obtain  
16 possession of the Property;

17 4. Permitting Movant to offer and provide Debtor with information re: a potential  
18 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss  
19 Mitigation Agreement, and to enter into such agreement with ("Debtor;

20 5. Alternatively, in the event this court declines to grant Movant the relief requested  
21 above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to  
22 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust  
23 and all other deeds of trust encumbering the Real Property, including Debtor's obligations to pay  
24 when due (a) the monthly installments of principal and interest, as required under the Note;  
25 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor in order  
26 to protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred  
27 in the filing of this motion;

28 /././

1           6.           That the attorneys' fees and costs incurred by Movant for filing the instant Motion  
2 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy  
3 law; and

4           7.           For such other and further relief as the court deems just and proper.  
5

6 Dated: April 21, 2010

PITE DUNCAN, LLP

8                               /s/ MELODIE A. WHITSON (CA SBN 253992)  
9                               Attorneys for WELLS  
                                  FARGO BANK, NA